

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 129 OF 2021.

Kishor s/o Ramdas Moharle,
Age 34 years, resident of Second
Bus Stop, Gopal Nagar,
Nagpur.

...

APPELLANT.

VERSUS

State of Maharashtra,
through P.S.O., P.O. Rana
Pratap Nagar, Nagpur (City).

...

RESPONDENT.

Shri A.K. Dobade, Advocate for the Appellant.
Shri M.J. Khan, A.P.P. for the Respondent.

CORAM : **VINAY JOSHI, J.**

DATE : **OCTOBER 29, 2021.**

ORAL JUDGMENT :

Challenge in this appeal is to the judgment and order of

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conviction dated 04.02.2021, passed by the Sessions Judge, Nagpur in Special Child Protection (POCSO) Case No.123/2021, by and under which the appellant/accused was convicted for the offence punishable under Sections 354 of the Indian Penal Code and Section 7 read with Section 8 of the Protection of Children from Sexual Offences Act, 1989 (POCSO Act). The trial Court sentenced the accused to suffer rigorous imprisonment for 3 years and to pay fine of Rs.1000/- for the offence punishable under Section 354 of the Indian Penal Code, and same punishment for the offence punishable under Section 8 of the POCSO Act. Both sentences were directed to run concurrently.

2. During trial, the accused was under-trial prisoner. At the time of admission of Appeal, this Court in terms of Section 389[1] of the Code of Criminal Procedure, has suspended the execution of sentence vide order dated 20.04.2021, however, the learned Counsel for the appellant/accused would submit that as the accused could not arrange for the surety, he is still languishing in jail. Upon instructions learned A.P.P. submitted that the statement made by the defence counsel is correct and still the accused is in jail.

3. The prosecution case can be briefly stated that, the accused

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aged 34 years was residing on upper floor, whilst the victim girl aged 11 years was residing with her parents on the ground floor of the same tenement. On 27.09.2019, in the afternoon the accused called the victim, a school going girl, and asked her to bring pepsi candy. In turn the victim brought ice candy and went to give the same to the accused at his house. The accused asked her to keep the candy in kitchen, and when the victim was returning back, the accused obstructed her, hugged her and by pulling her closer touched her private part. On the following day, the victim girl narrated the incident to her mother, on which the police report was filed.

4. During the course of investigation, the police sent the victim girl for medical examination, carried panchnama of the scene of offence, seized clothes of victim, recorded statement of relevant witnesses and after collecting the chemical analyzers report filed final report before the Special Court. The investigating officer has also collected the date of birth certificate of the victim.

5. Charges were framed against the accused vide Exh.2. Since the accused denied the guilt and put the prosecution to the task of

establishing leveled charges with requisite standard of proof, the prosecution has examined as many as 6 witnesses. The prosecution evidence mainly consists of the evidence of victim girl, her mother, medical officer, panch witnesses and investigating officer. Besides that the prosecution relied on certain documents namely birth date certificate, first information report, spot panchnama, medical examination and chemical analyzers report. The defence of accused is of total denial and false implication, at the instance of rivalry.

6. On appreciation of evidence, the trial Court by relying on the evidence of victim and her mother, held that the charged offences are proved and accordingly sentenced him as aforementioned.

7. Heard learned Counsel for the appellant and learned A.P.P. for the respondent State. Perused impugned judgment and entire record and proceedings.

8. The fate of prosecution case entirely hinges around the evidence of P.W.2 Victim (Exh.18) and P.W.1 mother of victim (Exh.10), who has lodged the report. Since the accused is charged for the offence under the POCSO Act, the prosecution is under obligation

to establish that the victim was a 'child' within the meaning of Section 2[d] of the POCSO Act, at the time of occurrence. In this regard, P.W.1 victim's mother stated that the victim's date of birth is 06.07.2007. At the time of occurrence the victim was studying in 7th standard in a school at Pratap Nagar. Besides that victim girl in her evidence also stated her date of birth. During the course of investigation, the police have procured the date of birth certificate of the victim (Exh.12) issued by the Nagpur Municipal Corporation under the provisions of Registration of Birth and Death Act, 1969. The certificate being issued by a public authority in discharge of its official duty, it carries presumptive value under Section 35 of the Indian Evidence Act. As per the said certificate, the place of birth is Government Medial College and Hospital, Nagpur. The birth date entry was registered on 08.08.2007, whilst certificate was issued non 03.10.2013 by the authority under its seal and signature.

9. The learned defence counsel by disputing the age of victim contended that merely on production of birth date certificate, minority of the victim cannot be proved. He lends support from the decision of Sikkim High Court in case of **State of Sikkim .vrs. Girjaman Rai @ Kami**

and another – 2019 Cr.L.J. 4247. In said case, the Sikkim High Court has considered the general parameters regarding appreciation of evidence as regards to the date of birth certificate. Infact it is totally a factual aspect and satisfaction of Court about credibility of the evidence on the date of birth.

10. Pertinent to note that though the defence Counsel has disputed date of birth of victim, however, he has not challenged the victims date of birth during the evidence of victims' mother as well as victim. Not a single suggestion was given to these material witnesses about the date of birth of victim, nor they were cross examined on the point of date of birth. Last moment objection cannot be considered on the canvass of convincing evidence in the form of date of birth certificate (Ex.12) issued by the public authority. Therefore, it can be safely held that the prosecution has duly established that the victim was a 'child' at the time of occurrence.

11. Having regard to the nature of accusation, the evidence of victim carries importance. The trial Court has assessed the intellectual capacity of the minor victim by putting preliminary questions and on personal satisfaction has recorded her evidence by administering oath.

It has come in her evidence that at the relevant time the accused was residing on the upper floor of her house. On the date of occurrence, the accused gave her currency note of Rs.10/- and asked her to bring 5 pepsi candy. Accordingly she brought the candies and while returning to her house, the accused obstructed her by his hand. The accused offered her pepsi and then hugged and offered her money. She deposed that the accused took her closer and touched her private part. Some how she escaped from the clutches of the accused and ran away. Precisely, this is the evidence of the victim girl aged 11 years regarding occurrence. She was cross examined by the defence, however, besides minor omissions, the defence is unable to bring any material so as to discard her testimony.

12. P.W.1 victim's mother led evidence at Exh.10. She stated that on the following day of the occurrence, the victim told her that she is suffering pains at her private part. On enquiry, the victim narrated the entire occurrence to her, as stated above. After realizing the things, she went to police station and lodged report. She also withstood on the touchstone of the cross examination. Her evidence corroborates the victims version on core issue, so also police report

(Exh.12) supports said evidence. As against the said consistent evidence about sexual assault, the defence is unable to bring any material to create reasonable doubt.

13. It has been held by the Hon'ble Supreme Court that the testimony of the victim in rape cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. (*see Sham Singh vrs. State of Haryana 2019[2] Mh.L.J.[cri] [SC]1*). In view of said settled position, I have no hesitation in relying on the credible testimony of the victim girl.

14. Learned defence counsel has submitted that though it has come in the evidence that there are neighboring residents, they have not been examined. It is argued that admittedly the ailing grand father of accused was at the house, and therefore, it is improbable to commit atrocities at the hands of the accused. He would submit that the

prosecution has not examined the shop keeper from where the victim brought pepsa candy. Precisely, it is his contention that the prosecution has not adduced evidence of material witnesses. The said submission is wholly untenable. The shop keeper from whom ice-candy was purchased cannot be termed as a material witness by any stretch of imagination. It is not the case of the victim that at the time of sexual assault, she raised alarm or called for help. In the circumstances, naturally neighboring persons may not know what was happening at the next door, and therefore, their evidence is not at all warranted.

15. Merely because age old person was in the house, it cannot be said that there was no possibility of accused committing the act. When there is direct evidence of minor victim, who has no animus against the accused, mere presence of grand father in the house consisting of three rooms cannot be a circumstance for jettisoning the evidence of the victim.

16. The prosecution has examined P.W.4 – Dr. Rashmi Solanki, a Medical Officer who has examined the victim on 28.09.2019. True there were no external injuries on the person of the victim, nor at her genitals. However, on merely moving of hand on the private part of

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the victim, one cannot expect medical evidence in that regard. However, it is to be noted that the medical examination report (Exh.26), bears a history stated by the victim regarding the occurrence. Notably, the victim has disclosed the act of accused of committing sexual assault to the medical officer, as she deposed in her evidence. Thus, from said quarter also, independent corroboration is available to vouch the credibility about the evidence of the minor victim.

17. The defence has criticized the prosecution case on the point of delay in lodgment of report. As per the prosecution case, the incident occurred on 27.09.2019 around 2 p.m., whilst the first information report was lodged on the following day around 5 p.m. Having regard to the nature of crime, time gap cannot be termed as inordinate delay. Always it depends upon the facts and circumstances of each case whether it amounts to inordinate delay or otherwise. It has come in the evidence that on the following day in the morning victims mother came to know about the facts on which, she went to the police and lodged report. It is trite law that in cases of sexual assault people remains to be back-footed or gives a second thought to stretch the matter to the police as it relates to the reputation of family.

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Herein within 28 hours from the occurrence report has been lodged, therefore, the delay is quite natural and would not be considered as fatal to the prosecution case.

18. Lastly, the defence contended that the building where victims family was residing as a tenant, was owned by maternal uncle of the accused. It is argued that since the victims' family was asked to vacate the tenanted premises, he has been falsely framed in the case. During statement recorded under Section 313 of the Code of Criminal Procedure, such defence is raised for the first time. Noteworthy to see that not a single suggestion was given to that effect to victims' mother during the course of cross examination. The after thought defence cannot be entertained against the direct evidence of victim girl. Besides that though some minor omissions have been pointed out, however, they have no impact on the core issue about sexual assault.

19. The evidence of minor victim is consistent, firm and reliable on the point of occurrence. The learned trial Court has rightly appreciated the evidence while reaching to the conclusion of holding accused guilty for the leveled charges. On independent scrutiny, I

concur with the view taken by the trial Court, hence, the appeal being devoid of merit stands dismissed.

JUDGE

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